Although Mr. Johnson was stopped for traffic violations on February 16, 2000, the stop occurred *after* an unidentified individual had left the vehicle and, after additional time had passed, Mr. Johnson entered the vehicle. *See* Tr. at 249, 273-74, 319-21, 330-31. While the police recovered some of the alleged buy money from the February 16 transaction, and a government analysis of the newspaper containing the money found several fingerprints, none of them belonged to Mr. Johnson. Tr. at 95-96. It is worth repeating, moreover, that an individual who claimed that money as her own stated that *she* had given the money to Mr. Johnson. R. 138, at 1; R. 215. Although the government also relied on taped conversations regarding the drug transaction, none of them mentioned Mr. Johnson. In short, the *only* direct evidence placing Mr. Johnson at the scene was the testimony of his alleged co-conspirator, Kenny Mohammed.

The government's lack of evidence against Mr. Johnson was compounded by Kenny Mohammed's inconsistent and unreliable statements before and during trial. Mohammed's trial testimony describing the January 28 transaction was flatly contradicted by the government's other evidence, including the testimony of government agents, informant Henry Adebayo, and surveillance tapes made during the transaction.

According to both the law enforcement agents conducting surveillance and informant Henry Adebayo, Mohammed approached a Toyota Corolla, leaning in the passenger-side window. Mohammed then left the Corolla and got in Adebayo's car, where Adebayo gave Mohammed a Fed-Ex package containing the buy money. Agents then observed Mohammed return to and enter the Corolla, exit and walk back to Adebayo's car, and hand Adebayo an object resembling a newspaper. Tr. at 37-39. Adebayo similarly testified that both the drugs and the money were exchanged in Adebayo's car. This testimony was supported by Mohammed's own statements on surveillance tapes made during the transaction. *See* Tr. at 365-66.

Despite all of this, Kenny Mohammed testified at trial to a completely different series of events. Mohammed claimed that he received the buy money in a restaurant, approached and entered the Corolla and obtained drugs from Mr. Johnson, and then gave the drugs to Adebayo as he was standing in front of a McDonald's. Tr. 173-74.

Mohammed's testimony about the February 16 transaction was also dubious. At the time of the transaction, a red Corolla was present in front of Mohammed's apartment building. Adebayo testified that the money and drugs were exchanged in his car. Tr. at 377. At trial, Mohammed claimed that he gave Mr. Johnson the buy money for that transaction in his apartment. Tr. at 184. However, Mohammed was under heavy surveillance during the entire transaction, and the agents did not observe either Mohammed or Mr. Johnson enter the building. Tr. at 669-70. In addition to the obvious inconsistencies and contradictions in the prosecution's evidence, one of the government's own expert witnesses acknowledged that it is "not unusual" for drug dealers such as Mohammed to name innocent individuals so that their actual suppliers will not harm them physically or financially. Tr. at 433-34.

Faced with these inconsistencies, the prosecution attempted to bolster Mohammed's unreliable testimony. Prosecutors repeatedly vouched for Mohammed's truthfulness from their opening statement through their closing argument. During Mohammed's direct examination, for example, the prosecutor suggested that the court had taken measures to guarantee his truthful testimony and introduced (over defendant's earlier objection) an immunity order forcing Mohammed to testify. *See* Tr. at 123-24, 158-59. In the process, the prosecutor elicited testimony that this "Court order" meant that Mohammed would be "sent to jail" if he testified falsely. Tr. at 158-59. The government also suggested that it possessed information not heard by the jury on the issue of Mohammed's veracity. Thus, for example, prosecutors observed that Mohammed had "provide[d] the

government with information in this case" and that he "agree[d] to be interviewed by agents" before he was granted immunity. Tr. at 154.

The prosecution later suggested that the trial judge's approval of Mohammed's sentence and its provision for a safety valve reduction involved a finding by the court, based on information submitted outside the presence of the jury, that Mohammed's testimony was truthful *as a matter of law*. *See* Tr. at 236. First, the government observed that Mohammed's safety valve reduction was approved by the judge that was presiding over Mr. Johnson's trial. Tr. at 161-62. Prosecutors then proceeded to tell the jury that one of the "requirements" that Mohammed had to satisfy before the court found him eligible for the safety valve reduction was that he "truthfully told the government all the information and evidence that [he] had concerning the offenses." Tr. at 234-36. In a series of leading questions, the prosecutor then noted that the judge had made his findings based on proceedings outside the presence of the jury and had determined that Mohammed met the requirements of the safety valve—including truthfulness—"as a matter of law":

> Q: [T]he Court had to make a finding that you qualified for it?
>
> A: Yes, sir.
>
> Q: Is it your understanding that Judge Kennelly actually made that finding that you did qualify for the safety valve?
>
> A: Yes, sir.
>
> * * *
>
> Q: Also, the source for those requirements, do you have an understanding that that is something basically rooted in federal law?

A: Yes, sir.

Q: And if you qualified under all those requirements, as a matter of law, you would qualify for the safety valve?

A: yes, sir.

Tr. at 236.

Thus, the prosecution suggested to the jury that the safety valve hearing conducted by the same judge (and relying on evidence submitted outside the presence of the jury) had resulted in a legal finding that Mohammed's testimony was truthful.

Prosecutors repeated their prejudicial remarks during closing and claimed that the prosecution's and the district court's actions had ensured Mohammed's truthfulness. For example, the prosecutor stated outright that the court's immunity order literally "*forces*" Mohammed "to come here and tell you the truth." Tr. at 526 (emphasis added). "And," the prosecutor followed, "*that is exactly what he did.*" Tr. at 526 (emphasis added). The prosecution then went on to vouch for specific testimony, directly asserting over and over again that Mohammed "told you the truth." Tr. at 526.

The prosecution made the same prejudicial assertions a second time during closing arguments, emphasizing that Mohammed "understands he needs to tell the truth" because he is "here under an order." Tr. at 534. Finally, in its rebuttal, the prosecutor again repeated that the court's immunity order meant that Mohammed had "something to fear from coming and lying," and suggested that the threat of being charged with perjury had ensured Mohammed's truthfulness. Tr. at 557-58.

The prosecution provided no direct evidence, except for Kenny Mohammed's testimony, linking Mr. Johnson to either of the alleged transactions. Despite the obvious flaws

in that testimony, however, the jury found Mr. Johnson guilty on all three counts of the indictment. R. 158-59.

3. On appeal to the Seventh Circuit, Mr. Johnson challenged his sentence on a number of grounds, including: the denial of due process and a fair trial as a result of the prosecution's repeated vouching for Mohammed's truthfulness; its suggestion that the government possessed information not heard by the jury; its improper assertion that the immunity order literally "forces" Mohammed to tell the truth; and the suggestion that the trial judge had already determined Mohammed's truthfulness "as a matter of law."

The court of appeals recognized the contradictions within the government's evidence. *See* Pet. App. 2a (discussing the differing testimony of Kenny Mohammed and the government's other witnesses, *i.e.*, "Mohammed, on the other hand, later testified ...."). The court nonetheless affirmed Petitioner's conviction and rejected his argument that prosecutors had denied him a fair trial by repeatedly vouching for the truthfulness of Kenny Mohammed.

First, the court of appeals held that it was proper for the prosecution to introduce the district court's immunity order because "testimony regarding the witness's guilty plea or immunity deal ... allows the jury to hear all relevant aspects of a witness's testimony at one time." Pet. App. 8a (quotation omitted). The court thus affirmed the district court's ruling that "introduction of the order was warranted to show that Mohammed's testimony 'can be used against him in a prosecution for perjury or false statement.'" Pet. App. 7a. In doing so, the court rejected the reasoning of several other courts of appeals that have held such testimony to be impermissible—including cases that specifically forbid the suggestion that a witness is truthful because of potential repercussions (such as prosecution for perjury) that may befall the witness if his testimony is false.

Second, the court of appeals held that there was no error in the prosecutor's suggestion that the trial judge, as part of

Kenny Mohammed's safety valve reduction hearing, had already found Mohammed truthful "as a matter of law." The court of appeals stated that "[t]he government at no time argued that the jury should believe the witness because the court found him truthful," and that "[g]overnment questioning regarding the witness's understanding of his agreement with the government is proper." Pet. App. 9a.

Last, the court of appeals held that all of the prosecution's vouching and bolstering during closing arguments was permissible because the prosecutor later stated that Mohammed's testimony was supported by supposed "corroborating" evidence. *See* Pet. App. 10a. This included the prosecutor's blunt and oft-repeated claims to the jury that Mohammed "told you the truth"; further assertions that the immunity order "force[d]" Mohammed to tell the truth; and additional suggestions that the government and the court were ensuring Mohammed's truthfulness through the threat of perjury charges. Pet. App. 10a-11a.

The appellate court thus affirmed Mr. Johnson's conviction, and this petition follows.

REASONS FOR GRANTING THE PETITION

This case affords the Court an opportunity to resolve several significant inter-circuit conflicts regarding questions of fundamental importance to the criminal justice system. In this case, the district court and the Seventh Circuit allowed the prosecution to go far beyond permissible constitutional bounds by repeatedly vouching for and bolstering an unreliable witness whose testimony conflicted with the government's other evidence. There are compelling reasons for this Court to review the court of appeals' decision, which has broad implications for the integrity of criminal proceedings.

First, the court of appeals wrongly held that the prosecution's use of the court's immunity order was proper because it "allows the jury to hear all relevant aspects of a

witness's testimony at one time." Pet. App. 8a. The court of appeals' decision conflicts with the decisions of other circuit courts which have held that it is improper to (1) suggest that a witness is truthful because of potential repercussions for lying, such as a future prosecution for perjury; (2) suggest that an order or plea agreement implies truthfulness on the part of the government witness; or (3) imply that the prosecution possesses information not heard by the jury on the issue of the witness's veracity.

The lower courts in this case allowed introduction of and testimony about the immunity order specifically to "show that Mohammed's testimony 'can be used against him in a prosecution for perjury or false statement.'" Pet. App. 7a. By contrast, other circuit courts have disallowed such threats precisely because they are used to improperly bolster the testimony of the witness, as was done in this case. Review is warranted to resolve this inter-circuit conflict and to clarify that a prosecutor may not bolster the testimony of a government witness by arguing that the witness would be subject to repercussions for lying.

Second, the court of appeals incorrectly held that it was permissible for the prosecutor to suggest that the trial judge had already found Mohammed truthful "as a matter of law" based on proceedings held outside the presence of the jury. This holding directly conflicts with the decisions of other circuit courts, which have held that a prosecutor may neither usurp the jury's role of evaluating the credibility of prosecution witnesses, nor suggest to the jury that the court is satisfied as to the truth of the witness's testimony. Indeed, other courts have recognized that a prosecutor's references to the district court's alleged determination regarding a witness's veracity are *even more* improper than comments reflecting the prosecutor's own beliefs.

Review is warranted to resolve this inter-circuit conflict and to clarify that a prosecutor may not intrude upon the jury's role of evaluating credibility—particularly by

suggesting that the court is satisfied with the witness's truthfulness.

Third, this Court should grant the petition in order to clarify that it is error for the prosecution to bolster or vouch for its own witness by indicating a personal belief in the witness's credibility. Other circuits have routinely held that a prosecutor may not make personal assurances that a witness is truthful or bolster the witness by indicating that information not presented to the jury supports the testimony. In this case, however, the Seventh Circuit allowed the prosecution to repeatedly tell the jury during closing argument that Mohammed "told you the truth" because the prosecutor later recounted "corroborating" evidence which actually conflicted, in obvious ways, with Mohammed's testimony. *See* Pet. App. 10a.

Review is warranted so that this Court can make clear that it is improper for a prosecutor to state that a government witness is truthful, and that mere recitation of the government's other evidence does not somehow turn an improper argument into a proper one.

I. The Court Of Appeals' Decision Allowing The Prosecution To Tell The Jury That Mohammed's Immunity Order "Forced" Him To Testify Truthfully Conflicts With The Decisions Of Other Courts Of Appeals.

During Mohammed's direct examination, the prosecutor suggested that the court had taken measures to guarantee his truthful testimony and introduced an immunity order forcing Mohammed to testify. *See* Tr. at 123-24, 158-59. In the process, the prosecutor elicited testimony that this "Court order" meant that Mohammed would be "sent to jail" if he testified falsely. Tr. at 158-59. The government also suggested that it possessed information not heard by the jury on the issue of Mohammed's veracity. For example, prosecutors observed that Mohammed had "provide[d] the

government with information in this case" and that he "agree[d] to be interviewed by agents" before he was granted immunity. Tr. at 154.

During its closing argument, the prosecution told the jury that the immunity order literally "*forces*" Mohammed "to come here and tell you the truth." Tr. at 526 (emphasis added). The prosecution also argued that Mohammed "understands he needs to tell the truth" because he is "here under an order." Tr. at 534. Finally, in its rebuttal, the prosecutor again repeated that the court's immunity order meant that Mohammed had "something to fear from coming and lying," and suggested that the threat of being charged with perjury had ensured Mohammed's truthfulness. Tr. at 557-58.

1. The district court specifically allowed introduction of and testimony about the immunity order to "show that Mohammed's testimony can be used against him in a prosecution for perjury or false statement." Pet. App. 7a (quotation omitted). The Seventh Circuit affirmed this reasoning on the basis that it is "not improper" for the prosecution to "remind the jury of the deterrent effect the threat of a perjury conviction has upon the conduct of government witnesses who ... might otherwise be inclined to lie." Pet. App. 8a.

The court of appeals' decision directly conflicts with the decisions of other circuit courts holding that it is improper to suggest that an order or plea agreement implies truthfulness on the part of a government witness or that a witness is truthful because of potential repercussions for lying, such as prosecution for perjury. Indeed, the specific reason cited by the district court and the court of appeals—showing that a witness's testimony can be used against him in a prosecution for perjury—is precisely the reason other circuits *do not* allow such evidence.

2. As Petitioner made clear to the court of appeals, the Sixth and Ninth Circuits have consistently held that

questioning and testimony of the type surrounding Mohammed's immunity order is improper. Indeed, both courts have reversed convictions on facts functionally identical to those of this case. *See, e.g.*, *United States v. Carroll*, 26 F.3d 1380, 1389 (6th Cir. 1994) ("improper vouching" occurred when a prosecutor implied that witnesses' plea agreements ensured that the witnesses were truthful); *United States v. Smith*, 962 F.2d 923, 933-94 (9th Cir. 1992) (finding improper vouching where the prosecutor assured the jury that the government's witness "could not just get up here and say whatever he wanted to say") (internal quotations and alterations omitted). *See also United States v. Wallace*, 848 F.2d 1464, 1474 (9th Cir. 1988) (holding that it is improper to allow the prosecution to elicit testimony on direct examination regarding the truthfulness requirement of a plea agreement).

As Judge Friendly pointed out nearly three decades ago, a prosecutor's statements suggesting that an agreement implies truthfulness on the part of a government witness constitute "prosecutorial overkill":

> They inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts—something the prosecutor is quite unable to do.... [T]he judge should have instructed that the promise in the cooperation agreement adds little to the truth-telling obligation imposed by the oath; that the prosecutor often has no way of knowing whether the witness is telling the truth or not; that the books are not filled with perjury indictments of Government witnesses who have gone beyond the facts; and that an acquittal would not mean as a matter of course that the Government would seek such an indictment ....

United States v. Arroyo-Angulo, 580 F.2d 1137, 1149-50 (2d Cir. 1978) (Friendly, J., concurring).

The Sixth Circuit and the Ninth Circuit have each adopted Judge Friendly's powerful argument. *See Carroll*, 26 F.3d at 1388-89; *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980); *see also United States v. Necoechea*, 986 F.2d 1273, 1278-79 (9th Cir. 1993). Those courts have further noted the "potential for impropriety" where a prosecutor implies, either intentionally or inadvertently, "that the prosecutor is in a special position to ascertain whether the witness was, in fact, testifying truthfully." *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999) (citing *Carroll*, 26 F.3d at 1387). The prosecutor's words "necessarily imply that the prosecutor has some method of determining whether the witness's testimony is truthful .... *The unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.*" *Carroll*, 26 F.3d at 1388 (quoting *United States v. Shaw*, 829 F.2d 714, 717 (9th Cir. 1987)) (emphasis added).

For all of the reasons discussed above, other circuit courts have rejected the premise of the Seventh Circuit's holding that the prosecution may "remind the jury of the deterrent effect the threat of a perjury conviction has upon the conduct of government witnesses ...." *See* Pet. App. 8a. Other courts prohibit statements threatening perjury charges or other potential ramifications for untruthful testimony, as well as assurances from the prosecutor that a witness is truthful because there are potential negative consequences for untruthfulness.

In *United States v. Carroll*, for example, the prosecutor stressed in closing argument that witnesses would lose the benefits of their plea agreements if they did not testify truthfully. 26 F.3d at 1382-83. The Sixth Circuit held that this constitutes "improper vouching": "[T]he prosecutor placed the prestige of the government, and even of the court, behind the credibility of [government witnesses], by stating that, if the government or the judge did not believe that the

witnesses were being truthful, the witnesses would be in jeopardy." *Id.* at 1389. This implied to the jury that the prosecutor and the court were satisfied that the witnesses were truthful. "This constitutes improper vouching." *Id.*

The Ninth Circuit has likewise held prosecutorial statements "clearly improper" where the prosecutor told the jury that government witnesses "had no reason to lie" and would risk losing their jobs and being prosecuted for perjury if they testified untruthfully. *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005); *see also United States v. Combs*, 379 F.3d 564, 575 (9th Cir. 2004) (holding that it was improper vouching when the prosecutor implied that "agent Bailey would be fired for committing perjury and that she believed no reasonable agent in his shoes would take such a risk").

Other courts of appeals, including the First, Second, Third, and District of Columbia Circuits, have also condemned vouching like that in the present case. For example, in *United States v. Boyd*, 54 F.3d 868 (D.C. Cir. 1995), the prosecutor vouched for police witnesses' credibility by arguing that "they would not lie on the stand and thereby jeopardize their careers and risk criminal prosecution." *Id.* at 871. The Court of Appeals for the District of Columbia held that this argument "relied on evidence not in the record and was *clearly improper*." *Id.* (emphasis added). In *United States v. Manning*, 23 F.3d 570 (1st Cir. 1994), the First Circuit ruled that a prosecutor's statement that government witnesses are "bound by the truth" was "improper witness-vouching by the prosecution." *Id.* at 572-73. *See also United States v. Martinez*, 981 F.2d 867, 871 (6th Cir. 1992) (argument that police witness, if lying, would risk 18-year career was "prosecutorial impropriety"); *United States v. Pungitore*, 910 F.2d 1084, 1125 (3d Cir. 1990) (disapproving of "prosecutor's comments that the U.S. Attorneys and law enforcement officers could not have behaved [] unscrupulously [] without violating their oaths of office and jeopardizing their careers"

because unsupported by record evidence); *United States v. Richter*, 826 F.2d 206, 209 (2d Cir. 1987) (condemning prosecutor's asking the jury why government agents would "come into this courtroom ... and risk their careers to get [the defendant]").

3. In the present case, the prosecution went far beyond the reasonable limitations applied by other circuit courts as discussed above. Among other things, the jury was told that Mohammed would be "sent to jail" if he testified falsely; that Mohammed had "something to fear from coming and lying"; and that Mohammed "understands he needs to tell the truth" because he is "here under an order." *See* Tr. at 158-59, 534, 557-58. The prosecution incorrectly stated that the immunity order literally "*forces*" Mohammed to "tell you the truth." Tr. at 526 (emphasis added). Of course, the order could do no such thing. It could only "force" Mohammed to testify—not to tell the truth.

The district court and Seventh Circuit allowed introduction of and testimony about the immunity order specifically to show that Mohammed's testimony could be used against him in a prosecution for perjury. Pet. App. 7a-8a. The court of appeals reasoned that "it is not error for the prosecutor to remind the jury of the deterrent effect the threat of a perjury conviction has...." Pet. App. 8a. To the contrary, however, the other circuit courts that have addressed this issue have specifically condemned and disallowed evidence introduced for such purposes. This case presents this Court an opportunity to resolve an inter-circuit conflict and to clarify whether a prosecutor may bolster the testimony of a government witness by suggesting the government and the court have forced the witness to tell the truth or are otherwise monitoring the witness's testimony to ensure its truthfulness.

II. The Court Of Appeals' Decision Allowing The Prosecutor To Suggest That The Trial Judge Had Already Found A Government Witness Truthful "As A Matter Of Law" Conflicts With The Decisions Of Other Courts Of Appeals.

The court of appeals' decision further conflicts with the decisions of other courts of appeals insofar as the court allowed the prosecutor to suggest that the trial judge had already found Kenny Mohammed truthful "as a matter of law." Here, the prosecution pointed out that Kenny Mohammed received a safety valve reduction in his sentence from the judge presiding over Mr. Johnson's trial. Tr. at 161-62. The prosecutor then proceeded to tell the jury that one of the "requirements" that Mohammed had to satisfy before the court found him eligible for the safety valve reduction was that he "truthfully told the government all the information and evidence that [he] had concerning the offenses." Tr. at 234-36. The prosecutor then noted that the Court had made its findings based on proceedings outside the presence of the jury and had determined that Mohammed met the requirements of the safety valve—including truthfulness—"as a matter of law." Tr. at 236. In allowing these statements, the court of appeals reasoned that the prosecutor's statements were permissible because he did not directly instruct the jury to "believe the witness because the court found him truthful." Pet. App. 9a.

1. The court of appeals' decision conflicts with the decisions of other circuit courts holding that it is error under any circumstances for the prosecutor to suggest to the jury that the court is satisfied as to the truthfulness of the witness's testimony. The decision also conflicts with the decisions of other circuit courts insofar as it allows the prosecutor to bolster a witness by indicating that information not presented to the jury supports the testimony.

2. Courts of appeals have consistently ordered reversal where the prosecution has placed the imprimatur of the court

behind a witness's testimony. In *United States v. Smith*, for example, the prosecution "suggested to the jury that the court also was satisfied as to the truth of [a witness's] testimony." 962 F.2d at 934. The court concluded that this type of vouching constituted plain error and was sufficiently prejudicial to warrant reversal. *Id.* at 933, 936. The court emphasized, moreover, that this type of vouching is qualitatively different from, and *even more* improper than, improper vouching reflecting the prosecutor's beliefs. *See id.* at 934; *see also Carroll*, 26 F.3d at 1388-89.

The *Smith* court reasoned that vouching for a witness on behalf of the court "casts the court as an active, albeit silent, partner in the prosecutorial enterprise." 962 F.2d at 936. This, in turn, violates two fundamental principles at the core of our criminal justice system. The first is the principle that there is a presumption of innocence in favor of the accused. *See Coffin v. United States*, 156 U.S. 432, 453 (1895). The second, closely intertwined with the first, is that "justice must satisfy the appearance of justice." *See In re Murchison*, 349 U.S. 133, 136 (1955) (quotation omitted).

As the *Smith* court further explained: "If the prosecution may invoke the court as guarantor of its truthfulness when the veracity of its star witness is challenged and can survive review for plain error, both the actual likelihood and the perception that an accused will receive a fair trial ... are severely diminished." 962 F.2d at 936. *See also United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) ("A prosecutor must not abuse his position and his duty to see justice done by invoking the authority of the court.").

The Sixth Circuit has likewise held that it is "improper vouching" for a prosecutor to imply to the jury that the court is satisfied that a witness is truthful. *See Carroll*, 26 F.3d at 1388-89. Of course, prosecutors in the present case did much more than merely imply the court's satisfaction. The prosecution stated outright that the trial judge had already

found the witness truthful in a different proceeding. Tr. at 236.

3. Even assuming, *arguendo*, that vouching on behalf of the court is proper (which it is not), the Seventh Circuit's holding would still conflict with other courts of appeals because it allows the prosecutor to bolster a witness by indicating that information not presented to the jury supports the testimony.

Numerous courts of appeals, including the Fourth, Fifth, Ninth, and Eleventh Circuits, have held that such bolstering is improper. "[T]he prosecutor may not ... implicitly bolster the witness by indicating that information not presented to the jury supports the testimony." *United States v. Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993); *see also United States v. Sims*, 719 F.2d 375, 377 (11th Cir. 1983); *Roberts*, 618 F.2d at 533-34 (bolstering a witness's credibility by reference to matters outside the record is error); *U.S. v. Lamerson*, 457 F.2d 371, 372 (5th Cir. 1972) (holding that it is reversible error when a prosecutor "makes a statement which could be construed by the jury as implying that he has additional reasons for knowing that what one witness has said is true").

Moreover, as noted above, a number of other courts have ruled that it is improper for prosecutors to rely on evidence that is not in the record. *See, e.g., Boyd*, 54 F.3d at 871 (finding reliance on such evidence to be "clearly improper"); *Pungitore*, 910 F.2d at 1125.

In sum, the decision below allows prosecutors to place the imprimatur of the court behind the governments' witnesses and usurp the jury's role of making credibility determinations. *See Hoffa v. United States*, 385 U.S. 293, 311 (1966) (credibility of a witness is to be determined by the jury). This Court should grant the petition to make clear that a prosecutor's vouching for his witness on behalf of the court is impermissible.

III. The Court Of Appeals' Decision Allowing the Prosecutor To Vouch for a Government Witness's Veracity So Long As the Prosecutor Also Argued That The Witness's Testimony Was Consistent With Other Evidence Conflicts With The Decisions Of Other Courts Of Appeals.

Finally, the court of appeals held that all of the prosecution's vouching and bolstering during closing arguments was permissible. *See* Pet. App. 10a-12a. This included the prosecutor's repeated statements that Mohammed "told you the truth," as well as assertions that the immunity order *forced* Mohammed testify truthfully and that "*that is exactly what he did.*" Tr. at 526 (emphasis added). The prosecution's closing and rebuttal also contained assurances that Mohammed had "something to fear"—such as prosecution for perjury—that ensured his truthfulness. Tr. at 557-58.

1. The court of appeals held that all of the prosecution's vouching and bolstering during closing arguments was permissible because the prosecutor purported to place his comments in the overall context of the remaining evidence. *See* Pet. App. 10a-12a. This ruling exposes two conflicts with the decisions of other courts of appeals. First, other courts have held that mere recitation of the evidence does not convert a prosecutor's improper arguments into proper ones. Second, unlike the Seventh Circuit in this case, this Court and numerous circuit courts recognize that there is a sense of proportionality involved in responding and that legitimate arguments by defense counsel do not give the prosecution free reign to say anything it wants.

2. It is beyond question that a prosecutor's statements of personal belief or opinion are improper. As this Court noted more than seven decades ago, a prosecutor has a duty to refrain from using improper methods, and the average jury has confidence that these obligations will be faithfully observed. *Berger v. United States*, 295 U.S. 78, 88 (1935).

"Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused *when they should properly carry none*." *Id.* (emphasis added). This Court has further emphasized that such comments "may induce the jury to trust the Government's judgment rather than its own view of the evidence," thereby intruding on the jury's role as fact-finder and denying defendants the right to a fair trial. *See United States v. Young*, 470 U.S. 1, 18-19 (1985).

The circuit courts have followed this mandate by prohibiting prosecutors' statements that indicate a personal belief in the credibility of the witness. *See, e.g., United States v. Piva*, 870 F.2d 753, 760 (1st Cir. 1989) (observing that "it is wrong for a [prosecutor] to inject his personal beliefs into a trial" and noting that "[w]e particularly disapprove of attempts by the government to characterize their witnesses as trustworthy") (citation omitted); *United States v. Cain*, 544 F.2d 1113, 1116 (1st Cir. 1976) ("It is, of course, elementary that statements of counsel as to personal belief or opinion are improper."); *United States v. Sanchez*, 118 F.3d 192, 198 (4th Cir. 1997) (impermissible vouching occurs when a prosecutor indicates a personal belief in the credibility of a witness); *Lewis*, 10 F.3d at 1089 (same); *United States v. Corona*, 551 F.2d 1386, 1390 (5th Cir. 1977) (a prosecutor may not "express his personal belief or opinion as to the truth or falsity of any testimony or evidence"); *United States v. Bess*, 593 F.2d 749, 754 (6th Cir. 1979) ("the established rule [is] that the personal opinion of counsel has no place at trial"); *Kerr*, 981 F.2d at 1053 ("A prosecutor has no business telling the jury his individual impressions of the evidence.").

Courts have applied the general rule in a way that would clearly prohibit the comments made here. In *United States v. Weatherspoon*, for example, the Ninth Circuit reversed a conviction obtained after vouching substantially identical to the prosecutor's repeated vouching in this case. "For any prosecutor to state his own view that witnesses are credible

or not credible, or indeed to say flat out—three times in rapid succession—that a witness 'told the truth,'... cannot fairly be labeled as 'no more than a comment on the evidence ....'" 410 F.3d at 1148. The prosecutor may *only* "invite the jury to make all of those determinations based on the evidence to which the prosecutor points." *Id.*

Other courts have employed similar reasoning. *See, e.g., United States v. Dandy*, 998 F.2d 1344, 1353 (6th Cir. 1993) ("It was improper for the prosecutor to state that [the witness] is honest."); *United States v. Krebs*, 788 F.2d 1166, 1176-77 (6th Cir. 1986) (finding prosecutor's statement, "I want to suggest to you that in his trial testimony [the witness] was telling the truth," to be an "inexcusable" form of "misconduct").

3. Despite the clear-cut rule above, the court of appeals in this case allowed the prosecution's blunt statements and other vouching because the prosecutor later claimed that Mr. Mohammed's "truthfulness" was supported by "all of the evidence in this case." Pet. App. 10a-11a.

Even if the evidence allowed the inference that Mohammed's testimony was truthful—which it did not—the prosecution's "flat out statements" about Mohammed's truthfulness would nonetheless be improper under the analysis employed by other courts of appeals. Although other courts recognize that prosecutors can argue "reasonable inferences based on the evidence," *see Weatherspoon*, 410 F.3d at 1147, this latitude is not limitless. The Ninth Circuit has thus held that "even when grounded in an inference from the evidence, a prosecutorial statement may nevertheless be considered impermissible vouching if it 'place[s] the prestige of the government behind the witness' ...." *Id.* (quoting *Roberts*, 618 F.2d at 533).

Other courts of appeals have likewise rejected the Seventh Circuit's reasoning. For example, in *United States v. Bess* the prosecutor was careful to interject that his comments were "based on the evidence which has been

presented to you (the jury)." 593 F.2d at 756. The Sixth Circuit held that "the use of this disclaimer" does not "convert improper argument into proper argument." *Id.* The adverse impact of the prosecutor's personal opinions are still present, regardless of whether counsel purports to limit the basis of his opinion to the facts at trial. *Id.*

This Court should grant the petition to make clear that a prosecutor's improper vouching for his witness is not permissible merely because it is purportedly linked to corroborating evidence.

CONCLUSION

This case presents this Court with a vehicle for resolving numerous inter-circuit conflicts regarding questions of fundamental importance to the criminal justice system. For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS G. *Smith*
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601

Counsel FOR PETITIONER

Dated: May 10, 2006

APPENDIX

APPENDIX
TABLE OF CONTENTS

Description	Page
U.S. Court of Appeals for the Seventh Circuit, Opinion (February 10, 2006)	1a
U.S. District Court for the Northern District of Illinois, Judgment in a Criminal Case (June 1, 2004)	22a

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FEMI JOHNSON,
Defendant-Appellant.

No. 04-2406.

Argued Dec. 2, 2006.

Decided Feb. 10, 2006.

Before **BAUER**, **POSNER**, and **MANION**, Circuit Judges.

BAUER, Circuit Judge.

A jury convicted Femi Johnson of one count of conspiring to possess with intent to distribute, and to distribute, heroin in violation of 21 U.S.C. § 846, and two counts of possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Johnson challenges his conviction claiming prosecutorial misconduct, insufficient evidence to support the jury verdict, failure of the district court to instruct the jury properly, and denial of his right to present witnesses in his defense. He also challenges his sentence. We affirm Johnson's conviction but order a limited remand to the district court in accordance with our decision in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

I. Background

In November 1999, a government informant named Henry Adebayo engaged Kenny Mohammed, whom he knew to be a

drug dealer, in a series of recorded conversations to arrange heroin purchases. Mohammed told Adebayo that he had to call a friend, Johnson, to obtain heroin. Mohammed and Johnson agreed that a sale would take place when Mohammed informed Johnson that the buyer was ready.

On January 28, 2000, agents fitted Adebayo with a recording device and supplied him with buy money. While waiting with Adebayo at Leona's restaurant in Hyde Park, Mohammed received a phone call and told the caller that he would meet him shortly. When they left Leona's, Adebayo returned to his car; Mohammed entered a wine-colored Toyota Corolla, driven by a black male, with tinted windows and Texas license plates. Agents then observed Mohammed walk to Adebayo's car, take the buy money, return to and enter the Corolla, exit and walk back to Adebayo's car, and hand Adebayo an object resembling a newspaper. This comports with Adebayo's later testimony that he and Mohammed exchanged the buy money for heroin while the two men were in Adebayo's car in front of the nearby McDonald's. Mohammed, on the other hand, later testified that Adebayo gave him the money while they were still at Leona's, and that he gave Adebayo the heroin while they stood in front of the McDonald's. After Mohammed left the car, agents saw Adebayo drive-off, followed him, and recovered fifty grams of heroin from inside the newspaper. Another agent followed the Corolla to the north side of the city, where it turned around and headed south.

After several more conversations with Mohammed, Adebayo succeeded in scheduling another transaction for February 16, 2000. Mohammed testified that he contacted Johnson to tell him that his "guy" was ready and to order seventy grams of heroin. When Johnson agreed and asked where to meet, Mohammed instructed him to go to the apartment building at 7337 S. South Shore Drive. Mohammed testified that they agreed to the same unit price as was paid for the January 28

transaction: "Since the other one was $5,000, this one was $7,000, I told him already." Later, Mohammed received a phone call and traveled with Adebayo to the apartment building, where they waited for Johnson to arrive with the heroin.

Agents monitored the apartment building in anticipation of the second controlled purchase. Earlier, they had given Adebayo $7,000 in buy money and recorded the serial numbers on the bills. The same wine-colored Corolla arrived at the apartment building. An agent observed Mohammed make an exchange with the driver. Mohammed testified that he took the heroin from Johnson in the Corolla, brought it to Adebayo, exchanged it for the money, and then went upstairs with Johnson to Mohammed's apartment. According to the agents, the fire lane in which the Corolla was parked presented surveillance problems. As a result, the agents did not observe Mohammed or Johnson enter the building. Only by moving to an area just north of the fire lane could DEA Agent William Wilson observe the Corolla leave the apartment building.

After the Corolla left, agents recovered the approximately seventy grams of heroin from Adebayo, while Customs Agent John Coleman followed the Corolla to the 8600 block of South Saginaw Street. There, Coleman saw the driver leave the car and enter a house, before returning to the car. Agent Coleman again followed the Corolla, which proceeded to turn right while signaling left, make a sharp right turn, accelerate sharply, run two red lights, weave through traffic, and run yield signs at cross streets. When Coleman could no longer keep pace with the car, he radioed for assistance. Officer Robert Sapp, who was part of the surveillance team, pulled the Corolla over after it ran a third red light. Johnson was the driver.

Officer Sapp discovered $5,950 in U.S. currency wrapped in newspaper in the glove compartment. Agents photocopied the bills, whose serial numbers matched the ones agents had recorded for $5,950 of the $7,000 given to Adebayo. Agents gave Johnson a receipt for the money. On February 24, 2000, in order to maintain the covert nature of the investigation, agents gave the money to Witness A, who claimed that she had given it to Johnson to purchase a car on her behalf. In early February 2001, Witness A was indicted and arrested for making false statements to federal agents in violation of 18 U.S.C. § 1001. While in custody, she said that Johnson had paid her $200 to tell the agents that the money belonged to her. Based on this statement, the complaint was dismissed without prejudice, as the government "expected her to be a cooperating witness."

On June 2, 2001, authorities arrested Johnson on conspiracy and possession charges. Shortly before trial, Witness A's attorney informed the government that she had reversed herself again and was prepared to testify consistent with her original statement. As a result, the government complied with a court order requiring disclosure of impeachment evidence by sending a letter to defense counsel indicating that Witness A was again a possible subject of investigation. In response to the defendant's subpoena, Witness A invoked her Fifth Amendment privilege against self-incrimination.

Johnson's trial began on November 19, 2003. In both voir dire questioning and opening statement, defense counsel indicated that Johnson's defense would be to attack Mohammed's credibility. During trial, the government called a number of witnesses, including Agent Coleman, who gave expert testimony that the supplier in a brokered drug deal will often be present in the area to ensure that he receives payment from the sale proceeds, just as Johnson did on these two occasions. Mohammed also testified for the government, relating the circumstances of the two transactions. The court

allowed the government to introduce the court's order granting Mohammed immunity and compelling his testimony. Accordingly, the prosecutor questioned him on direct examination about his understanding of the immunity agreement. On cross-examination, defense counsel questioned Mohammed about the dependence of his "safety valve" reduction[1] on pleasing the government with his testimony against Johnson. On redirect, then, the government questioned Mohammed about the facts omitted by defense counsel, such as all five of the factors considered by the court in determining safety valve eligibility.

At trial, Johnson never set forth a buyer-seller defense; rather, he argued that he was "not a drug dealer." During closing arguments, the prosecutor portrayed Mohammed as a credible witness based on the evidence corroborating his testimony. He stated that Mohammed "is here under an order" and "understands he needs to tell the truth." Defense counsel, in closing argument, argued that "Kenny Mohammed wasn't telling the truth. He had every incentive to lie." Responding in rebuttal, the prosecutor again raised Mohammed's immunity agreement to demonstrate his incentive to testify truthfully. No buyer-seller jury instruction was requested by either party and none was given. On November 25, 2003, the jury found Johnson guilty of the conspiracy and possession counts. On May 14, 2004, Judge

---

[1] The safety valve provision of 18 U.S.C. § 3553(f) allows the district court to depart below the statutory mandatory minimum sentence for certain drug offenses if the defendant satisfies each of the five criteria set forth in the statute. See also U.S.S.G. § 5C1.2. The provision generally applies "where the defendant is a first time offender who was not the organizer or leader of criminal activity and has made a good faith effort to cooperate with the government." United States v. Harrison, 431 F.3d 1007, 1013 (7th Cir. 2005).

Kennelly imposed an enhancement for obstruction of justice under the Sentencing Guidelines and sentenced Johnson to seventy months in prison. Johnson now challenges his conviction and sentence.

II. Discussion

Johnson advances the following five arguments on appeal: (1) that prosecutors denied him a fair trial by improperly vouching for the truthfulness of government witness Mohammed during their case-in-chief and closing argument; (2) that the evidence presented by the government was not sufficient to prove Johnson guilty of conspiracy and possession beyond a reasonable doubt; (3) that the district court erred when it failed to instruct the jury on a buyer-seller defense; (4) that the government denied him the right to present witnesses in his defense by threatening Witness A with investigation and indictment; and (5) that the district court violated Johnson's Sixth Amendment rights by enhancing his sentence for obstruction of justice. We consider each claim in turn.

A. Fair Trial

Johnson first contends that the government made improper remarks during examination and closing argument, thereby denying him a fair trial. Because Johnson did not object at trial to the remarks he now challenges, we review only for plain error. *United States v. Renteria*, 106 F.3d 765, 766 (7th Cir. 1997). Under the plain error standard, the defendant must establish not only that the prosecutor's remarks were improper and denied him a fair trial, but also that they prejudiced him by altering the outcome of the proceedings. *United States v. Sandoval-Gomez*, 295 F.3d 757, 762 (7th Cir. 2002).

1. Testimony Concerning Mohammed's Immunity Agreement

During direct examination of Mohammed, the district court allowed the government to introduce the court's order granting Mohammed immunity and compelling his testimony. The court specifically stated that introduction of the order was warranted to show that Mohammed's testimony "can be used against him in a prosecution for perjury or false statement." Johnson now claims that the government exceeded the bounds of the order and "told the jury" that Mohammed would be sent to jail if he testified falsely. The prosecutor told the jury no such thing; instead, he merely questioned Mohammed about his understanding of the agreement:

> Q. So what could happen if you were to not tell the truth today?
> A. I will be sent to jail.

This question was not improper--it was within the bounds of the court's order. Moreover, the government immediately sought to clarify Mohammed's comment about being "sent to jail":

> Q. Could you at least be prosecuted is what your understanding is?
> A. Right.
> Q. Based on what you say here today?
> A. What did you say?
> Q. You could be prosecuted based on what you say here today if you were to not tell the truth; is that your understanding?
> A. Right, right, right.

This exchange does not, as Johnson claims, constitute improper bolstering of a government witness. On direct

examination, the government may elicit testimony regarding the witness's guilty plea or immunity deal because doing so allows the jury to hear "all relevant aspects of a witness's testimony at one time." *United States v. Montani*, 204 F.3d 761, 766 (7th Cir. 2000). The government may generally introduce this evidence regardless of whether the witness's credibility has already been attacked. *Id.* Here, however, the government introduced this evidence on direct examination because defense counsel had already signaled, in voir dire questioning and in opening statement, that Johnson's defense would be to attack Mohammed's credibility.

The prosecutor in this case did not, as Johnson claims, suggest that the government's or the court's authority rested behind the witness's testimony. Johnson cites to several cases where other Courts of Appeals have found that the government improperly vouched for the witness, but each is readily distinguishable from the present case. This is not a case where the prosecutor stated outright in closing argument that the witness could not say "whatever he wanted to say" because he would be prosecuted for perjury, and that "the court wouldn't allow" the government to do anything wrong in the trial. *See United States v. Smith*, 962 F.2d 923, 934 (9th Cir. 1992). Nor is it the case where a prosecutor, again in closing argument, stated that the witnesses would be in jeopardy if the government or the court did not believe that they were telling the truth. *See United States v. Carroll*, 26 F.3d 1380, 1389 (6th Cir. 1994). Instead, here the government properly questioned Mohammed about his understanding of the agreement he signed with the government. As this Court has stated, "it is not improper for the prosecutor to remind the jury of the deterrent effect the threat of a perjury conviction has upon the conduct of government witnesses who to obtain a grant of immunity might otherwise be inclined to lie." *United States v. Kramer*, 711 F.2d 789, 795 (7th Cir. 1983). Because this line of

inquiry was proper, there was no plain error. *See United States v. Mealy*, 851 F.2d 890, 900 (7th Cir. 1988).

2. Testimony Concerning Mohammed's Safety Valve Reduction

Johnson also claims that the government improperly suggested that the court had already found Mohammed's testimony truthful as a matter of law based on proceedings outside the jury's presence. In introducing evidence of an agreement, prosecutors may not imply that they possess information not heard by the jury on the issue of the immunized witness's testimony. Mealy, 851 F.2d at 900. As stated above, defense counsel alluded to Mohammed's lack of credibility during both voir dire questioning and opening statement. In his opening, defense counsel stated that Mohammed received a "benefit that was indirect ... as a result of his plea." In cross-examining Mohammed, defense counsel further intimated that the safety valve reduction Mohammed received at sentencing depended on his pleasing the government. On redirect, then, the government sought to elicit those facts that defense counsel failed to mention on cross-examination, including the four other safety valve criteria and the court's role in ultimately determining Mohammed's safety valve eligibility under federal law. *See* U.S.S.G. § 5C1.2. The government at no time argued that the jury should believe the witness because the court found him truthful. Government questioning regarding the witness's understanding of his agreement with the government is proper. *See Mealy*, 851 F.2d at 900. Where defense counsel raises the issue of sentencing and makes statements regarding the witness's agreement, the government may provide appropriate clarification of any mischaracterization. *United States v. Sanchez*, 251 F.3d 598, 603 (7th Cir. 2001). Here, because the prosecutor merely placed the circumstances of Mohammed's safety valve sentencing into proper context, the government's conduct was proper.

3. Closing Remarks Regarding Mohammed's Truthfulness

Johnson additionally argues that the prosecutor, in closing argument, improperly suggested that the government's and the court's actions ensured Mohammed's truthfulness. He first objects to the prosecutor's recital in closing of the circumstances of Mohammed's appearing to testify. The prosecutor described Mohammed's initial reluctance to testify and Judge Kennelly's ensuing order of immunity, which he said "takes away Kenny Mohammed's ability to assert the Fifth and forces him to come here and tell you the truth. And that is exactly what he did." The prosecutor immediately thereafter detailed the substance of Mohammed's testimony and compared it to other evidence that "corroborates what Kenny Mohammed told you from the stand." Also, when relating Mohammed's testimony, the prosecutor repeatedly intoned, "he told you the truth."

These remarks about the witness's truthfulness, however, are acceptable when placed in context with corroborating evidence. For instance, in *United States v. Morgan*, this Court found that the prosecutor did not inject his personal opinion into the trial by characterizing the witness as "an honest person." 113 F.3d 85, 89 (7th Cir. 1997). Because the comment was immediately preceded by the prosecutor's argument that corroborating evidence showed the witness to be truthful, the prosecutor's comment was "a permissible inference from the evidence, not improper vouching." *Id.* at 90. The same is true here. Where the government characterizes a witness's credibility "based on the evidence," the argument is proper because it is based on the record instead of "the prosecutor's own personal belief." *United States v. Clarke*, 227 F.3d 874, 884 (7th Cir. 2000). Because the prosecutor premised Mohammed's truthfulness on "all of the evidence in this case" and stated that the jury must "consider all of it together," his remarks constituted a

permissible credibility argument based on the evidence, not improper vouching based on his personal belief.

Second, Johnson challenges the government's later remarks in closing to the effect that Mohammed "is here under an order" and "understands he needs to tell the truth" if he wanted to avoid a possible return to jail. Again, though, where a prosecutor comments during closing argument on a witness's veracity but then follows with a comparison to other evidence presented at trial, the comment reflects "evidence presented at trial and not the prosecutor's personal opinion." *United States v. Goodapple*, 958 F.2d 1402, 1410 (7th Cir. 1992). As described above, the prosecutor in this case acted properly--he surveyed the evidence corroborating Mohammed's testimony and from that evidence assessed his credibility. As in the following example, the prosecutor's closing argument portrayed Mohammed as credible based on the evidence taken as a whole:

He told you the truth, and he told you that he got heroin from the defendant. He told you the truth, that he sold that heroin to Henry Adebayo, and he told you the truth, that he took the money from that sale and gave it to the defendant, the supplier of that heroin. That was the brokered transaction. You know that Kenny Mohammed told you the truth from all of the evidence in this case. The evidence in this case corroborates what Kenny Mohammed told you from that stand.

The prosecutor then proceeded to summarize that corroborating evidence, discussing the recordings of Mohammed receiving and making calls before the transactions, the testimony of agents who witnessed the wine-colored Corolla and Mohammed's movements at both transactions, the expert testimony of Agent Coleman regarding the typical structure of these drug transactions, and the evasive moves made by Johnson in the wine-colored

Corolla. Thus, the prosecutor properly argued that the evidence compelled the conclusion that Mohammed complied with his immunity agreement by testifying truthfully. See *Clarke*, 227 F.3d at 885 (holding that the prosecutor's statement about a witness's truthfulness was proper "because the evidence showed that [the witness] complied with the plea agreement, not that [he] told the truth simply because he entered into the plea agreement.").

Finally, Johnson challenges the prosecutor's rebuttal remarks again referencing the immunity order. One of defense counsel's arguments in closing was that "Kenny Mohammed wasn't telling the truth. He had every incentive to lie." In rebuttal, the prosecutor responded by arguing that Mohammed understood "that he could be prosecuted for perjury based on what he told you in Court today if it turned out that what he said was not true," and further that "Kenny Mohammed has no incentive in this case to not tell you the truth." Yet again, however, the prosecutor placed these remarks in context by telling the jury that it "will be able to judge him ... not only by what he said, but also by the corroborating evidence," which the prosecutor then reviewed. Moreover, he specifically anticipated the court's instruction to the jury to consider the evidence "with caution and care," stating that "[t]he government asks that you do that." The government's reference in closing argument to a witness's truthfulness is proper so long as the remarks are "tied to the evidence presented at trial or reasonable inferences from that evidence," rather than personal opinion. *United States v. Robbins*, 197 F.3d 829, 843 (7th Cir. 1999). Our review of the record reveals that the theory of the defense was to attack Mohammed's credibility. The defense argued in closing that Mohammed "wasn't telling the truth" and "had every incentive to lie," thus inviting a response from the prosecutor. *See id.* As a result, the prosecutor's comments in rebuttal were meant to "right the scale" and were not improper. *See id.*

B. Sufficiency of the Evidence

Johnson next asserts that the evidence presented at trial was insufficient to establish beyond a reasonable doubt that he was guilty of the conspiracy and possession counts. We review a jury's sufficiency of the evidence determination "in the light most favorable to the government and uphold ... a jury's decision if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Burke*, 425 F.3d 400, 415 (7th Cir. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). We will indulge all reasonable inferences that benefit the government. *United States v. Sanchez*, 251 F.3d 598, 601 (7th Cir. 2001). Because great deference is given to the jury, a verdict will be overturned only if we find that "the record contains no evidence, no matter how the evidence is weighed, from which the jury could have found guilt beyond a reasonable doubt." *Burke*, 425 F.3d at 415.

1. Conspiracy

Under 21 U.S.C. § 846, a conspiracy exists where: "(1) two or more people agreed to commit an unlawful act[;] and (2) the defendant knowingly and intentionally joined in the agreement." *United States v. Gardner*, 238 F.3d 878, 879 (7th Cir. 2001). In order to support a conspiracy conviction, the government must establish beyond a reasonable doubt that there was a "combination or confederation between two or more persons formed for the purpose of committing, by their joint efforts, a criminal act." *United States v. Sullivan*, 903 F.2d 1093, 1098 (7th Cir. 1990). The government must establish that the defendant's relationship with the other conspirators was "more than a mere association." *Id.* at 1098-99. An explicit agreement, however, is not required; a jury can infer an agreement from the parties' course of dealing. *Sanchez*, 251 F.3d at 602.

Johnson argues that the evidence of conspiracy was insufficient because it proved only an ordinary buyer-seller relationship between him and Mohammed, not a joint conspiracy to sell heroin to Adebayo. Evidence that the defendant was in a mere buyer-seller relationship with the alleged coconspirator is insufficient to establish a conspiracy. *See United States v. Rock*, 370 F.3d 712, 714 (7th Cir. 2004). That remains true "even when the buyer intends to resell the purchased narcotics." *United States v. Mims*, 92 F.3d 461, 465 (7th Cir. 1996). There is sufficient evidence to establish a conspiracy, however, where the jury finds credible a government witness who shows that the alleged coconspirators were "on the same side of the transaction." *United States v. Smith*, 393 F.3d 717, 720 (7th Cir. 2004).

We will not upset the jury's credibility determination unless "exceptional circumstances" exist; that is, it was "physically impossible for the witness to observe that which he claims occurred, or impossible under the laws of nature for the occurrence to have taken place at all." *Id.* at 719. Here, the events described by Mohammed were neither physically impossible nor contrary to the laws of nature. His testimony contained inconsistencies, to be sure--Mohammed recalled the January 28 exchange occurring at a different spot than the one remembered by the agents, and the agents did not observe Mohammed enter the 7337 apartment building on February 16, as he remembered doing. After defense counsel emphasized these contradictions in closing argument and the court instructed the jury to consider them in assessing Mohammed's testimony, though, the jury still found Mohammed credible. As we have said before, "it is not for us to second guess" the jury's credibility determination in a sufficiency challenge. *United States v. Smith*, 34 F.3d 514, 521 (7th Cir. 1994).

The evidence presented by the government was sufficient to establish that the parties acted in concert, with the object of

distributing heroin to the third-party buyer in two separate transactions. If Mohammed's testimony is to be believed, Mohammed contacted Johnson before the first transaction to obtain the heroin for resale to the customer, Adebayo. Johnson did not make Mohammed pay up front but rather waited for Mohammed "to procure the money" from the customer. *See United States v. Smith*, 393 F.3d 717, 720 (7th Cir. 2004). After the transaction, Mohammed paid Johnson for the heroin, along with $250 as a brokering commission, from the money he received from Adebayo.

Before the February transaction, Mohammed again told Johnson that his "guy," the buyer, was ready. Afterwards, he again paid Johnson from the sale proceeds, both for the heroin and for the commission. The price, $100 per gram of heroin, was the same for both transactions. Furthermore, Agent Coleman's expert testimony about the incentive suppliers have to position themselves near brokered drug deals corresponds with Johnson's behavior in these two instances. Taken together, this evidence of repeat sales, a standardized course of dealing, and trust between the parties was sufficient to establish that Mohammed and Johnson "formed a continuing and mutually profitable relationship to distribute drugs." *Sanchez*, 251 F.3d at 602. Because a reasonable jury could conclude that the two were on the same side of the transaction, the evidence was sufficient to establish a conspiracy. *See United States v. Smith*, 393 F.3d 717, 720 (7th Cir. 2004).

2. Possession

Johnson similarly argues that the evidence presented by the government was insufficient to establish that Johnson possessed heroin. The government's case against Johnson depended heavily, though not exclusively, on Mohammed's testimony, described above. The principles described above in reference to Mohammed's credibility apply equally to

Johnson's conviction on the possession counts. *See United States v. Smith*, 34 F.3d 514, 521 (7th Cir. 1994). A reasonable jury, crediting this testimony, could infer that Johnson possessed and transferred heroin to Mohammed in exchange for money. Additionally, the government presented substantial evidence corroborating Johnson's possession. Agents observed a wine-colored Toyota Corolla with tinted windows and Texas license plates at both the January 28 transaction and the February 16 transaction. Immediately after the first transaction, agents observed the car engage in an evasive counter-surveillance excursion from the south side to the north side of Chicago. In the same automobile, Johnson engaged in an erratic and high-speed flight from agents shortly after the second transaction. Agents recovered from Johnson the cash, identified unmistakably by serial number, provided to Adebayo earlier that day to purchase heroin from Mohammed. Together, Mohammed's testimony and the corroborating evidence provided sufficient evidence to support Johnson's possession conviction. *See United States v. Smith*, 393 F.3d 717, 719 (7th Cir. 2004).

C. Buyer-Seller Defense Instruction

Johnson also claims that the district court erred by failing to instruct the jury *sua sponte* that repeat drug sales alone do not constitute a conspiracy. Because Johnson did not tender a buyer-seller instruction or object to its omission, we review for plain error. *United States v. Askew*, 403 F.3d 496, 502-03 (7th Cir. 2005). To reverse a conviction under the plain error standard, we must find that: (1) an error occurred; (2) it was "plain," meaning obvious or clear; (3) it affected the defendant's substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* (quoting *United States v. Gibson*, 356 F.3d 761, 765-66 (7th Cir. 2004)). District courts should instruct juries that repeat transactions by themselves do not constitute a conspiracy only if "the instruction has some foundation in

the evidence." *United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987).

In assessing the propriety of giving the instruction, we consider whether the defendant put forth a buyer-seller theory at trial. *Askew*, 403 F.3d at 503. Finding no error in Askew, this Court noted that the defendant's trial strategy, denying any involvement with drugs instead of asserting a buyer-seller defense, "cuts in favor of finding no error in the district judge's decision not to give the instruction." *Id.* at 504. Here, as in Askew, it is undisputed that Johnson did not advance a buyer-seller theory of defense. He argued instead that he was "not a drug dealer" and so could not have supplied Mohammed with heroin for the two transactions. The strength of the evidence indicating a conspiracy, combined with Johnson's decision at trial not to pursue a buyer-seller theory of defense, leads to our conclusion that the district court did not commit plain error by declining to give the instruction *sua sponte*. *See Askew*, 403 F.3d at 504-05.

D. Intimidation of Defense Witness

Johnson further alleges that the government denied him constitutional due process by threatening investigation and indictment of a defense witness, Witness A, to prevent her from testifying. We review allegations of prosecutorial threatening of defense witnesses for abuse of discretion, which arises where the prosecutor "intends to use his authority to distort the judicial fact-finding process." *United States v. Hooks*, 848 F.2d 785, 799 (7th Cir. 1988). A fundamental element of due process is the right of the accused to present witnesses in his own defense. *Id.* (citing *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). Defense witnesses must be free to testify without fear of governmental retaliation. *United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005). The defendant's

right to present witnesses, however, is tempered by the witness's Fifth Amendment privilege not to provide incriminating testimony. *United States v. George*, 363 F.3d 666, 671 (7th Cir. 2004). A prosecutor may therefore caution a defense witness about the risks of testifying, but "[w]here ... the substance of what the prosecutor communicates to the witness is 'a threat over and above what the record indicate[s] was timely, necessary, and appropriate,' the inference that the prosecutor sought to coerce a witness into silence is strong." *United States v. Jackson*, 935 F.2d 832, 847 (7th Cir. 1991) (quoting *United States v. Simmons*, 670 F.2d 365, 369 (D.C. Cir. 1982)).

At trial Johnson wanted Witness A to testify that she had given Johnson $5,950, the amount seized by Officer Sapp from Johnson's car, so that Johnson could purchase a car on her behalf. When she initially told agents that account in February 2000, they gave her the money in order to keep the investigation "covert." Witness A was arrested and indicted approximately a year later. Although Johnson now describes this complaint as "flimsy," the government is correct in presuming that Witness A would have a difficult time explaining how money that supposedly belonged to her bore the serial numbers of bills that agents had given to Adebayo to purchase heroin. In fact, she admitted while in custody that Johnson had paid her $200 to fabricate the story. As a result, the criminal complaint was dismissed without prejudice because the government "expected her to be a cooperating witness." In fall 2003, shortly before the trial was scheduled to begin, because she again reverted to her original account of events, the government understandably designated her a subject of investigation once again. In response to the defendant's subpoena, Witness A invoked her Fifth Amendment privilege against self-incrimination.

The government announced its changed position in the following letter to defense counsel:

> Witness A is currently the possible subject or target of an investigation concerning false statements and/or obstruction of justice concerning her statements on February 24, 2000, and she may be charged with a crime. The U.S. Attorney's Office currently has not provided Witness A with any consideration or promises of consideration.

Significantly, this announcement was made to Johnson and his counsel, not to Witness A. The fact that the disputed language appeared in a court-ordered letter to defense counsel, a rather inefficient medium for conveying threats to a witness, suggests that it probably was not intended to deter Witness A from testifying. After all, this line of cases focuses on "what the prosecutor communicates to the witness." *Jackson*, 935 F.2d at 847.

The government's messages to a witness, conveyed through defense counsel, have in the past been held to be improper threats. *See, e.g., United States v. Morrison*, 535 F.2d 223, 225-26 (3d Cir. 1976). In Morrison, however, the prosecutor's conduct was far more flagrant; he sent messages to the witness through defense counsel on three occasions communicating "that she was liable to be prosecuted on drug charges; that if she testified, that testimony would be used as evidence against her and, further, that as she was now eighteen it would be possible to bring federal perjury charges against her." *Id.* at 225. The prosecutor further subpoenaed the witness and had her brought into his office for a meeting with three undercover agents to impress on her again the dangers of testifying. *Id.*

The letter sent by the government in this case does not approximate the actions taken by the prosecutor in Morrison. Here, the letter conveyed accurate information about the risks Witness A faced by testifying, and contained a single warning instead of several. Where the prosecution simply

presents the facts to the witness, informing him that he is the target of an investigation and providing him with a warning, no constitutional violation occurs. *Jackson*, 935 F.2d at 847. Moreover, no evidence indicated that the letter sent to defense counsel was intended as a message to Witness A; to the contrary, the government sent the letter to comply with a court order requiring disclosure of impeachment evidence. Because the letter was not directed to Witness A and none of its language can fairly be construed as overreaching or improper intimidation, there is no basis in the record from which to conclude that the government improperly threatened her, procured her unavailability, or caused her to invoke the privilege. On the contrary, the government had a reasonable basis to believe that Witness A was a possible subject of prosecution. The court accordingly considered her assertion of the Fifth Amendment privilege in light of the "plainly incriminating nature of the proposed testimony." *George*, 363 F.3d at 671. Thus, Johnson's right to present a defense was not violated by Witness A's invocation of her Fifth Amendment privilege.

E. Limited Remand

Finally, Johnson challenges his sentence, asserting that the court's mandatory application of the Guidelines made the sentence improper. In *United States v. Booker*, the Supreme Court held that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." 543 U.S. 220, 125 S.Ct. 738, 746, 160 L.Ed.2d 621 (2005). Accordingly, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756. Because the court based Johnson's enhancement on his statements at the suppression hearing, none of the relevant facts were found by a jury. Moreover, the parties do not

dispute that at the time of defendant's May 2004 sentencing, the district court regarded the Sentencing Guidelines as mandatory.

Because the Supreme Court rendered the Guidelines advisory, "the mere mandatory application of the Guidelines--the district court's belief that it was required to impose a Guidelines sentence--constitutes error." *United States v. White*, 406 F.3d 827, 835 (7th Cir. 2005) (citing Booker, 125 S.Ct. at 769). It is impossible to say whether the court would have imposed the same sentence knowing that the Guidelines were advisory. Therefore, we order a limited Paladino remand to determine whether the district court, treating the Guidelines as advisory, would reimpose the same sentence. *See United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005).

III. Conclusion

For the foregoing reasons, we AFFIRM Johnson's conviction. While retaining jurisdiction, we remand to the district court for proceedings consistent with *Paladino*, 401 F.3d at 483-84.

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

JUN 01 2004

UNITED STATES OF AMERICA
V.
Fern Johnson

DOCKETED
JUN 01 2004

JUDGMENT IN A CRIMINAL CASE

Case Number: 01 CR 103-2
USM Number: 20455-424
Keri Ambrosio and Andrea Gambino
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court

X was found guilty on count(s) one, two and three of second superseding indictment after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC § 846	Conspiracy to Possess with Intent to Deliver a Controlled Substance	3/22/2000	One
21 USC §841(a)(1)	Delivery of a Controlled Substance	3/22/2000	Two, Three

BEST AVAILABLE COPY

DEFENDANT: Fern Johnson
CASE NUMBER: 01 CR 103-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

70 months on Counts 1 - 3, to run concurrently

X The court makes the following recommendations to the Bureau of Prisons:
That defendant be designated to Oxford, WI, or Pekin, Illinois, because he has a wife and young children who live in Chicago.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Femi Johnson
CASE NUMBER: 01 CR 103-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Four years on Count One
Three years on Counts Two and Three to run concurrently with Count One

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT Fern Johnson
CASE NUMBER 01 CR 103-2

ADDITIONAL SUPERVISED RELEASE TERMS

Defendant is to be turned over to the proper immigration authorities for deportation proceedings. If deported, defendant is to remain outside the United States and is not to return without the written consent of the United States Attorney General.

DEFENDANT: Ferdi Johnson
CASE NUMBER: 0: CR 166-2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ Waived	$

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Pam Johnson
CASE NUMBER: 08-CR-103-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence: _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.